No. 83-1577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PAUL DeFIORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether it is properly within the scope and application of the wire fraud statute, 18 U.S.C., § 1343, to prosecute alleged violations of a state statute and municipal ordinance relating to cigarette taxes especially where particularized federal legislation exists which was specifically intended to provide federal assistance to states in collecting cigarette taxes;

2. Whether the wire fraud statute may properly be applied by the Government as a basis for additional counts in an indictment in order to increase the sentence;

3. Whether the telephone calls in questions were significantly related to the alleged scheme(s) to defraud New York of cigarette taxes; and

4. Whether the indictment was so totally devoid of evidentiary support as to render conviction improper and/or unconstitutional.

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Petitioner, Paul DeFiore, respectfully prays that a writ of certiorari issue to review the November 2, 1983 decision of the United States Court of Appeals for the Second Circuit that affirmed in part and reversed in part the judgment of conviction rendered in the United States District Court for the Eastern District of New York.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit, affirming in part and reversing in part petitioner's conviction, is reported in 720 F.2d 757 (1983), and is printed in Appendix "A."

JURISDICTION

The United States Court of Appeals for the Second Circuit filed its decision on November 2, 1983. A timely Petition for Rehearing, printed in Appendix "B," was filed on December 6, 1983, and it was denied on January 25, 1984. This petition for certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), in order to determine questions of importance relative to the scope and proper application of 18 U.S.C. § 1343, commonly known as the wire fraud statute. *See, Parr v. United States*, 363 U.S. 370, 373, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1959).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are set forth in Appendix "C."

STATEMENT OF THE CASE

Petitioner was tried under a ten-count indictment alleging violation of 18 U.S.C. § 1343 (wire fraud). The indictment specifically charged that petitioner and co-defendants, Galler, Coppola and Kerns, defrauded the state and city of New York of substantial cigarette tax revenues in violation of a New York state statute and New York City ordinance.[1]

The indictment specifically alleged that DeFiore and co-defendants, Galler, Coppola and Kerns transported substantial quantities from a North Carolina corporation known as Piedmont, to New York, in

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[1] The indictment alleged that the state of New York was empowered pursuant to Article XX, Section 171 of its tax regulations, and the city of New York was empowered pursuant to its Cigarette Tax Law, Chapter 46, Title D, to collect taxes on each package of cigarettes possessed for sale in the state and/or city of New York. Note in Appendix "C" hereto that New York Statutes, Article XX, Section 171, does *not* generally or specifically impose a cigarette tax; but rather, Section 171, empowers the state tax commission to tax property, stock, personal income, mortgages and motor vehicles. The exclusive New York state statute relating to cigarette taxes is New York Statutes, Article XX, Section 471, which imposes a cigarette tax, but only under certain circumstances. Nonetheless, the indictment does not allege a scheme to defraud under that section of the New York tax statutes. Note also that New York Statutes, Article XX, Section 471, places the tax burden on the consumer, and by its own terms, it provides that, under certain circumstances, the cigarette tax may be collected without the use of cigarette stamps.

violation of the before-mentioned New York state statute and the municipal ordinance. Piedmont maintained a bank account at the Citibank, Brooklyn Branch, and as part of the alleged scheme, substantial cash deposits were made in Piedmont's account. Thereafter, persons from Piedmont telephoned Citibank to verify the cash deposits. Ten (10) telephone calls from Piedmont in North Carolina to Citibank, corresponding to the ten (10) counts of the indictment, allegedly brought the scheme under the wire fraud statute, 18 U.S.C. § 1343.[2]

At trial, Piedmont's president, John Cox, testified that Piedmont was a North Carolina wholesale distributor of cigarettes, and as such, authorized to affix North Carolina stamps on cigarettes. [R.T. 42.][3] Cox also testified that the North Carolina tax was two cents ($.02) per pack compared to the New York cigarette tax of twenty-three cents ($.23) per pack. [R.T. 42.]

In 1974, DeFiore began purchasing cigarettes from Piedmont. In order to facilitate these purchases, Piedmont opened its bank account with Citibank's Brooklyn Branch. [R.T. 89-93.] Using Citibank's customer service telephone number, Piedmont usually verified the deposit of money in its New York account. [R.T. 93-94.] Cox testified that the Citibank account was used for other transactions beside the sale of cigarettes. [R.T. 237.]

Based upon the testimony of Frank Napoli, an agent for the Bureau of Alcohol, Tobacco and Firearms, Piedmont's telephone toll records were admitted into evidence. Agent Napoli testified that he audited the financial records of Piedmont, including its checking account activity with Citibank's Brooklyn Branch which he compared with Piedmont's telephone records. Agent Napoli attempted to correlate deposits made into Piedmont's Citibank account with telephone calls from Piedmont's offices in North Carolina to Citibank's customer service telephone number, or other numbers in New York City and suburbs. Napoli testified that deposits were made in the Citibank account within three (3) to ten (10) days of a telephone call from Piedmont to Citibank. [R.T. 543.]

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[2] Note: Two (2) of the telphone calls were not even from a North Carolina phone number; but rather, the two (2) calls were from an unidentified source in New York to North Carolina. The Court of Appeals reversed convictions on the two (2) counts corresponding to those two (2) phone calls.

[3] Reporter's Transcript of the trial.

Napoli also testified that his analysis of Piedmont's business activity established that during the periods alleged in the indictment Piedmont was carrying on business in the greater New York area with various cigarette companies including Atlantic Tobacco Company and Philip Morris. [R.T. 564-565.] Therefore, there is a substantial likelihood the Citibank account was used for those transactions.

Cox testified that generally, Piedmont would not ship cigarettes to a customer unless they were paid cash on delivery or the purchase price was deposited into Piedmont's bank account. In the latter event, Piedmont would confirm the deposit by telephone. The uncontroverted testimony of Cox established that neither he, nor Piedmont, broke any North Carolina or federal law, or other state law, in either selling or transporting the cigarettes. [R.T. 148, 163, 165 and 173.] There was no testimony whatsoever that any cigarettes were purchased by or through petitioner and shipped into New York. The only testimony linking Piedmont to the transporting of cigarettes to New York was that Cox purchased two vans and a truck. [R.T. 116.] An investigator for the New York State Department of Taxation and Finance testified that he saw one of these trucks in Brooklyn, New York on April 4, 1978. [R.T. 607.] One witness testified that in 1979 he purchased some cigarettes without New York state tax stamps from co-defendant, Galler.

In the District Court, the jury returned a verdict of guilty as to petitioner on all ten (10) counts of the indictment. Petitioner's motions for acquittal, new trial and arrest of judgment were denied, and he was sentenced to three (3) years imprisonment as to each of the ten (10) counts. The sentences were to run concurrently with petitioner serving six (6) months and the balance of the sentence suspended. Petitioner was also fined $1,000.00 cumulative as to each of the ten (10) counts.

Petitioner appealed the conviction and sentence to the United States Court of Appeals of the Second Circuit pursuant to 28 U.S.C. § 1291. The Court of Appeals dismissed two (2) counts of the indictment. While the Government contended that each of the telephone calls set forth in the indictment constituted a separate crime since each furthered a single scheme to defraud New York of cigarette tax revenues, the Government conceded in its oral argument on appeal that there was no proof as to where the great bulk of the cigarettes were transported and sold. In addition, the Government further conceded that it failed to establish a nexus, or connection, between any particular telephone calls set forth in the indictment and the transportation and sale of cigarettes in New York.[4]

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[4] *See, United States v. DeFiore*, 720 F.2d 757, 765 (2nd Cir. 1983).

The Court of Appeals' decision carries a strong dissent which notes that the Government acknowledged in its authorities that it was required to prove a scheme involving a false statement or other deception intended to cause New York to lose tax revenues. All the evidence showed was a scheme to purchase, and presumably sell, cigarettes without a tax stamp. If deception of New York was proven, it was only the single incident where a truck owned by Cox was observed in Brooklyn in April 1978, and the sale of a small number of cigarettes. None of the calls alleged in the eight counts which were affirmed involved the trucks in question, trips to New York, or cigarette sales. Moreover, under New York state and city law, it is unclear whether such isolated incidents constitute violations of tax and/or criminal laws.

The trial transcript further suggests the Government's failure to prove its case. In specific response to the District Court's expressed concern as to whether the Government met its burden of proof in the case, the Government responded that:

> No one is able to state that the calls were made in furtherance of the conspiracy. The Government is asking that because bank deposits were made, that must mean every call was made in that connection.

The District Court replied:

> I understand what you are saying -- you are saying in effect that the jury would have to speculate.
>
> • • •
>
> But there is no evidence . . . that sustains any suggestion of a shipment of cigarettes or shipments of cigarettes which accompanies the telephone calls to the bank. [R.T. 647-648.]

Cox further testified that he had no recollection whatsoever of using Piedmont's telephone on the dates alleged in the indictment. Moreover, he had no recollection, nor was any other testimony taken, which established, much less suggested, the content of any of the alleged telephone calls made between Piedmont in North Carolina and New York, or vice versa. [R.T. 226-227.]

REASONS FOR GRANTING THE WRIT

I.

THE WIRE FRAUD STATUTE SHOULD NOT BE APPLIED BY THE GOVERNMENT TO PROSECUTE ALLEGED VIOLATIONS OF A STATE STATUTE OR MUNICIPAL ORDINANCE RELATING TO TAXES, ESPECIALLY WHERE PARTICULARIZED FEDERAL LEGISLATION EXISTS.

Statutes, such as 18 U.S.C. §§ 1341 (the mail fraud statute) or 1343, should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress.[5] There is no federal precedent for application of the federal wire fraud statute to enforce a municipal ordinance, and its application to enforce state law has been seriously questioned. Such a strict construction is, therefore, necessary where the Government urges the Court to construe a federal criminal statute so that it reaches conduct which the states should appropriately control, such as set forth in a state criminal or revenue statute. *See, e.g., United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 5 L.Ed. 37 (1820); *United States v. Kelem*, 416 F.2d 346, 347 (9th Cir. 1969), *cert. denied*, 397 U.S. 952, 90 S.Ct. 977, 25 L.Ed.2d 134 (1970). *See also, United States v. Louderman*, 576 F.2d 1383, 1388 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978).

Moreover, in *United States v. Maze*, 414 U.S. 395, 405-406, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), Chief Justice Burger noted in his dissenting opinion that the mail fraud statute:

> . . . has traditionally been used against fraudulent activity as a first line of defense. When a "new" fraud develops -- as constantly happens -- the mail fraud statute becomes a *stop-gap device* to deal on a temporary basis with the new phenomenon, until *particularized legislation* can be developed and passed to deal directly with the evil. [Emphasis added.]

Particularized federal legislation does exist relating to enforcement of state cigarette tax laws. The Jenkins Act, 15 U.S.C. § 375, *et seq.*, enacted on October 19, 1949, requires any persons selling or disposing of cigarettes in interstate commerce to forward to state tobacco tax

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[5] Mail and wire fraud statute cases generally follow each other in their development.

administrators a memorandum identifying to whom shipments are made. Violation of the Jenkins Act is a *misdemeanor* punishable by a fine of not more than $1,000.00, or imprisonment for not more than six months, or both. 15 U.S.C. § 377.

The purpose of the Jenkins Act is to assist the States in collecting state-imposed sales and use taxes on cigarettes. S. Rep. No. 644, July 11, 1949. In particular, the need for such legislation was because: "The avoidance of State sales and use taxes on cigarettes by interstate shipments to consumers in States taxing cigarettes is depriving the States of large amounts of sorely needed revenue." In addition: "A further objection to this technique of avoiding State-imposed cigarette taxes is the fact that the United States mails are used to accomplish the avoidance."

On November 2, 1978, the Trafficking and Contraband Cigarettes Act, 18 U.S.C. § 2341, *et seq.* (hereinafter the "Trafficking Act") was enacted. The Trafficking Act makes it unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes. "Contraband cigarettes" are defined as a quantity in excess of 60,000 cigarettes which bear no evidence of payment of the applicable state cigarette taxes. 18 U.S.C. §§ 2342(a) and 2341.

The purpose of the Trafficking Act is to provide a solution to the "serious problem" of "interstate cigarette bootlegging and to help provide law enforcement assistance and relief to cities and States." S. Rep. No. 95-962, June 28, 1978, p. 3. The Senate defined the scope of the problem as follows: "Since 1965 cigarette bootlegging has become a serious problem for a number of States in the areas of tax administration and law enforcement." The Report noted that during 1976, New York lost approximately 72.3 million dollars in taxes because of cigarette bootlegging. *Id.* at p. 5.[6]

The Court of Appeals' decision herein renders into insignificance the Jenkins and Trafficking Acts. Moreover, it is clear that Congress has enacted increasingly particularized legislation in dealing and assisting with the enforcement of state cigarette tax laws. In particular, the

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[6] Note: 18 U.S.C. § 2345, specifically provides that the Trafficking Act does not affect the concurrent jurisdiction of a State to enact and enforce cigarette tax laws, and to provide for penalties for violation of such laws. 18 U.S.C. § 2345. Compare Section "D" under Reasons for Granting Petition, *infra*.

Trafficking Act relates to contraband cigarettes. In the present case, the Government alleges that approximately 2,404,738 cartons of cigarettes were transported from North Carolina to New York. Since specific legislation exists relating to bootlegged cigarettes, the Government should have been compelled to prosecute petitioner under either the Jenkins or Trafficking Acts.

In *United States v. Henderson*, 386 F.Supp. 1048, 1050, 1051 (S.D.N.Y. 1974), the defendant, music artist Skitch Henderson, was charged under an indictment with an alleged attempt to evade the payment of substantial income taxes by use of back-dated and fraudulent documents and false statements designed to obtain the benefit of tax deductions of charitable donations. The charges against Henderson arose from his deductions for charitable donations of musical scores and arrangements to the music library at the University of Wisconsin.

Count I of the indictment was based upon a letter dated December 31, 1969, mailed by the defendant to the University of Wisconsin in which he proposed to donate the music library and stated, allegedly falsely, that Leonard Bernstein, Henry Mancini, Victor Alpert and he were of the view that a fair evaluation per selection in the library was $650.00. Defendant, Henderson, contended that the mail fraud statute was *not* intended by Congress to apply to any scheme to defraud the United States, or a state, in an attempt to evade the payment of taxes.

In dismissing the mail fraud counts against Henderson, the district court held that it was beyond the purpose and thrust of the mail fraud statute (18 U.S.C. § 1341), predecessor of the wire fraud statute, which is clearly limited to protecting the *public*, more precisely, the "gullible public" against the various fraudulent schemes that the "cunning of some trickster might devise." Moreover, the district court indicated that over the entire course of the statute's broad application by the courts, it had generally been "*confined to schemes of a type designed to defraud members of the community at large*, in the sale of commodities and services, *rather than schemes to defraud the Government*." *Id.* at p. 1053.

Henderson noted that predecessor legislation to the mail fraud and wire fraud statutes was enacted in 1889, and that:

> [I]t was directed primarily at confidence men who engaged in schemes to sell counterfeit currency. The bill as finally passed encompassed schemes to obtain money by

> what is commonly called the "sawdust swindle," or "counterfeit mail fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars" . . . *Id.* at p. 1052.

Citing Chief Justice Burger's dissent in *Maze, supra, Henderson* held that in revenue or taxation matters there is no need to use the mail fraud statute as a "stop-gap device" after "particularized legislation" is enacted to "deal directly with the evil," since Congress and/or the state legislatures will have afforded adequate protection of the public interest in the collection of such taxes or revenues. As a result, the district court determined that the mail fraud statute, and by analogy the wire fraud statute, are "confined" to schemes of a type designed to defraud members of the community at large, *e.g.*, the public, rather than schemes to defraud the New York state or federal governments. *Id.* at 1053.

II.

THE INDICTMENT REPRESENTED AN ATTEMPT BY THE GOVERNMENT TO DESCRIBE AS A FEDERAL OFFENSE ACTS WHICH, AT MOST, CONSTITUTED BREACH OF A STATE OR MUNICIPAL MISDEMEANOR LAW.

The district court's subject matter jurisdiction in this matter was based on the use of interstate telephone calls to further the alleged scheme to defraud New York state and city. *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979). The petitioner moved the district court herein to arrest judgment.

In *United States v. Beall*, 126 F.Supp. 363, 365 (N.D. Cal. 1954), the court ruled that the fifteen counts of the indictment dealing with the alleged mail fraud scheme to embezzle charitable funds failed to state an offense under the mail fraud statute.

> The basic difficulty with Counts VI through XX is that they represent an attempt to describe as a federal offense acts which clearly constitute a breach of the laws of a state.

In the present matter, the Government has similarly attempted to describe as a federal offense, to wit, violation of the wire fraud statute, acts which clearly constitute, if anything, a breach of the revenue/tax laws of the state or city of New York. In so ruling, the *Beall* court followed *Kann v. United States*, 323 U.S. 88, 95, 65 S.Ct. 148, 151 (1944), which held that:

> The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails [or wires] is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.

[*See also,* Tenth Amendment to the United States Constitution.]

III.

THE WIRE FRAUD STATUTE WAS IMPERMISSIBLY USED BY THE GOVERNMENT TO INCREASE PETITIONER'S SENTENCE.

The courts have repeatedly expressed "misgivings" over use of the mail or wire fraud statutes as a basis for additional counts in an indictment, the gravamen of which was violation of another federal or state criminal statute.[7] *United States v. Mangan*, 575 F.2d 32, 49 (2d Cir. 1978); and *United States v. Dixon*, 536 F.2d 1388, 1398, 1401 (2d Cir. 1976). This Court has increasingly recognized the potential for prosecutorial abuse under the wire fraud statute as protected against by the Fifth Amendment. *Ashe v. Swenson*, 397 U.S. 436, 445, fn. 10, 90 S.Ct. 1189,

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[7] A former Chief of Business Frauds Prosecutions of the United States Attorney's office for the Southern District of New York has stated: "To federal prosecutors of white collar crime, the mail [and wire] fraud statute is our Stradivarious, our Colt 45, our Louisville Slugger, our Cuisnart - and our true love." Rakoff, "*The Federal Mail Fraud Statute*," 18 Duq. L. R. 771 (1980). Mail/wire fraud was the second-most frequently charged white-collar offense in the Southern District of New York in the years 1963-1976. Hagan & Nagel, *White-Collar Crime, White-Collar Time: The Sentencing of White-Collar Offenders in the Southern District of New York*, 20 Am. Crim. L. Rev. 259, 286 (Table 6) (1982). Statistics published by the Department of Justice show that 1981 criminal filings under the mail and wire fraud statutes accounted for 3.8% of the total criminal filings. In 1980 that figure amounted to 3.4% and in 1979, 3.5%. United States Attorneys' Office, Statistical Reports, Fiscal Year 1981, 1980 and 1979.

25 L.Ed.2d 569 (1969).[8] As the dissent herein notes, some "line drawing" is needed.

Henderson, supra, 386 F.Supp. at p. 1054, held that the Government's use of the mail fraud statute to provide additional counts upon essentially the same allegations as required to sustain tax evasion improperly permits the "pyramiding of sentences in the event of conviction." As a result, the district court dismissed the three (3) wire fraud counts because they were "impermissibly used" by the Government in an attempt to reach the same offenses and increase the same penalties in the event of conviction, beyond the intent of Congress.[9]

In the present matter, had DeFiore been convicted under the Jenkins Act, it would have been a misdemeanor requiring a fine of and/or imprisonment of not more than six (6) months. Under Article XX of the New York Statutes, § 481, the penalty for violation is imprisonment of not more than one (1) year (a misdemeanor). By contrast, DeFiore was prosecuted for ten (10) counts of wire fraud, carrying a potential sentence of $10,000.00 in fines and/or fifty (50) years in prison. He was sentenced to three (3) years in prison. It is not difficult to see the arbitrary sentencing parameters, and potential for abuse, available to federal prosecutors under the wire fraud statute. The Fifth Amendment protects against such multiple, cumulative punishments for the same offense. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); *Brown v. Ohio*, 431 U.S. 161, 97 S.Ct. 2221, 2225-2226, 53 L.Ed.2d 187 (1977).

The test in determining whether there was one offense, or multiple offenses, is whether each count of the indictment requires proof of an

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[8] "For at common law, and under early federal criminal statutes, offense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense [and count]. [Citation.] In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses [and counts] from a single alleged criminal transaction. . . . The federal courts soon recognized the need to prevent such abuses through the [Fifth Amendment]. . . ."

[9] District Judge Weinfeld noted that: "The policy of the prosecution of fragmentizing charges which center about the filing of an alleged false tax return, by applying the mail fraud statute under three separate counts, two of which include the mailing of the very income tax returns at issue, with the result that a conviction would permit multiple sentences reaching staggering, if not utterly unrealistic, years of imprisonment, has its outer limits. In my view the outer limits were set by Congress. . . ." [Emphasis added.] *Id.*

additional fact which another count does not require. *Brown, supra*, 97 S.Ct. at p. 2225. Based upon such a test, the indictment, and sentencing herein were improperly multiplicious. *See also, United States v. Wilson*, 565 F.Supp. 1416, 1431 (S.D.N.Y. 1983).

IV.

THE TELEPHONE CALLS SET FORTH IN THE INDICTMENT WERE NOT SIGNIFICANTLY RELATED TO THE ALLEGED SCHEME(S) TO DEFRAUD.

The use of the wires must be a step in the execution of the scheme charged in the indictment, and not incidental thereto, in order to constitute an essential element to an offense under 18 U.S.C. § 1343. The entire conduct of the particular scheme to defraud must be dependent upon the use of the wires or mails. *United States v. Hopkins*, 357 F.2d 14, 17 (6th Cir. 1966), *cert. denied*, 385 U.S. 858 (1966). The telephone use must be an "integral part" of the transaction or scheme to defraud. *United States v. Ashdown*, 509 F.2d 793, 799 (5th Cir. 1975), *cert. denied*, 423 U.S. 829 (1975). The telephone calls from Piedmont to Citibank were not central to the scheme as alleged in the indictment herein.

In *United States v. Maze*, 414 U.S. 395, 94 S.Ct. 645, the defendants stole a credit card and fraudulently used it to obtain food and lodging at motels. The mails were used by the motels to obtain payment on invoices from banks. In *Maze*, this Court noted that, if anything, such mailings "increased the probability that [the] respondent would be detected and apprehended." *Id.* at p. 402, 94 S.Ct. at 694.

In the instant matter, the Government produced no evidence whatsoever, nor did it make any other showing, that the success of the scheme as alleged in its indictment depended in any way on the various telephone conversations between Piedmont Corporation and Citibank's Brooklyn Branch. Therefore, it cannot be reasonably determined, or inferred circumstantially, that such telephone conversations by Piedmont were "for the purpose of executing a scheme or artifice [to defraud] within the meaning of 18 U.S.C. § 1343." *United States v. Huber*, 603 F.2d 387, 399-400 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

V.

THE GOVERNMENT FAILED TO PROVE THE CONTENT OF THE ALLEGED TELEPHONE CALLS.

In a federal wire fraud case, the Government must do more than prove that certain telephone calls were made; but rather, it bears the greater burden of *proving the content of the telephone calls. Osborne v. United States*, 371 F.2d 913, 927 (9th Cir.), *cert. denied*, 387 U.S. 946, 87 S.Ct. 2082, 18 L.Ed.2d 1335 (1967). *See also, United States v. Garner*, 633 F.2d 834, 838 (9th Cir. 1981). As in the instant matter, in *Osborne*, the Government presented telephone company records indicating that certain telephone calls had been made. Witnesses who made the telephone calls, however, were unable to identify exactly to whom they had spoken or to recall and testify to the specifics of each of the conversations. The court concluded that this evidence was "of no aid in proving what the telephone calls were about, or any of their content. *We can pretty well surmise their content, but we cannot convict defendant . . . on surmise.*" *Id.* at p. 928. [Emphasis added.] As a result, the *Osborne* court reversed the wire fraud convictions because it could not assume that "an unknown . . . conversation had an unlawful purpose, without a record to support that assumption." *Id.* at p. 929.

In the present case, Cox testified that he could not recall making the telephone calls enumerated in the indictment, much less recall the content of any of those telephone calls. [R.T. 226-228.] The Government was unable to prove the content of any of the telephone calls alleged in the indictment.

Based on the foregoing, it is obvious that the jury was compelled to *speculate* as to the *content* of the telephone calls listed in the indictment in convicting the petitioner. The requisite nexus between use of interstate wires and an alleged scheme to defraud may "not turn on time or space," as the Government suggests in the present matter. *United States v. La Ferriere*, 546 F.2d 182, 187 (5th Cir. 1977). The *Osborne* holding, *supra*, dictates that the jury may not convict based on such speculation or "surmise." Therefore, the Government failed to meet its burden herein.

This Court is empowered to grant a writ where it determines that there was insufficient evidence as a matter of law, or the indictment was without requisite evidentiary support. *Washington v. United States*, 357

U.S. 348, 78 S.Ct. 1373, 2 L.Ed.2d 1368 (1958); and *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 624 (1960).

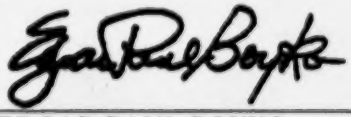
CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

DATED: March 22, 1984

Respectfully submitted,

MILLER, BOYKO AND BELL



By_____
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Counsel of Record, and
H. PAUL KONDRICK

Attorneys for Petitioner

APPENDICES

UNITED STATES of America, Appellee,

v.

Paul DeFIORE, Joseph Coppola and Robert Galler, Defendants-Appellants.

Nos. 1206, 1319 and 1332, Dockets 82-1447, 83-1014 and 83-1025.

United States Court of Appeals, Second Circuit.

Argued July 11, 1983.

Decided Nov. 2, 1983.

The appealing defendants were convicted in the United States District Court for the Eastern District of New York, Edward R. Neaher, J., of a scheme to defraud the Department of Taxation and Finance, State of New York, and the finance department, city of New York, of substantial cigarette tax revenues, in violation of wire fraud statute. On appeal, the Court of Appeals, Maletz, Senior Judge, sitting by designation, held that: (1) as to the element of interstate commerce, evidence with respect to content of telephone calls was sufficient to sustain conviction on eight counts, but no nexus was shown between two telephone calls and scheme to defraud, and convictions of two defendants on two counts of indictment were accordingly not sustained by evidence; (2) despite particular defendant's contention that cigarettes were packaged in plain brown cardboard cartons and that he could not be charged with knowledge that he was transporting untaxed cigarettes, evidence was sufficient to sustain his conviction for aiding and abetting, it being not necessary that such defendant know all details of the criminal venture to be considered a participant in its criminal purpose; and (3) no other claim of error was established.

Conviction of two defendants reversed as to counts five and eight; judgments of conviction otherwise affirmed.

Winter, Circuit Judge, filed opinion concurring in part and dissenting in part.

1. Telecommunications — 362

Federal wire fraud statute focuses upon misuse of wires, not regulation of state affairs, and applies to schemes to defraud federal or state governments of taxes due them. 15 U.S.C.A. §§ *375-378; 18 U.S.C.A.* §§ 1343, 2341-2346.

2. Telecommunications — 362

Congress has authority to regulate such misuse as use of wires to defraud federal or state governments of taxes due them. 18 U.S.C.A. § 1343.

3. Criminal Law — 1144.13(1)

Defendant advancing claim based on insufficiency of evidence to sustain conviction bears very heavy burden.

4. Telecommunications — 363

As to element of interstate commerce, in prosecution for wire fraud, evidence with respect to content of telephone calls was sufficient to sustain conviction on eight counts, but no nexus was shown between two telephone calls and scheme to defraud, and convictions of two defendants on two counts of indictment were accordingly not sustained by evidence. 18 U.S.C.A. § 1343.

5. Telecommunications — 363

Despite particular defendant's contention that cigarettes were packaged in plain brown cardboard cartons and that he could not be charged with knowledge that he was transporting untaxed cigarettes, evidence in prosecution for wire fraud was sufficient to sustain his conviction for aiding and abetting, it being not necessary that such defendant know all details of the criminal venture to be considered a participant in its criminal purpose. 18 U.S.C.A. §§ 2, 1343.

6. Criminal Law — 863(2)

In view of fact that trial judge upon objection immediately explained how supplemental charge related to ten counts of indictment, there was no error, much less plain error.

7. Criminal Law — 384

Where evidence of acts and transactions prior to five-year statute of limitations period went directly to establish intent, as well as

preparations and plans that went into scheme to defraud such evidence, was admissible even though it antedated the limitations period. Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

8. Criminal Law — 1036.2
Witnesses — 240(1)

In evidence rule stating that leading questions "should not" be used on direct examination of witness except as may be necessary to develop his testimony, words "should not", are words of suggestion, not command, and absence of contemporaneous objection or even request for cautionary instruction with regard to prosecutor's use of leading question obviated need of Court of Appeals to consider bare claim of prejudice. Fed.Rules Evid.Rule 611(c), 28 U.S.C.A.

9. Criminal Law — 636(3), 1035(6)
Jury — 142

Defendant can waive his right to be present during period of often routine voir dire questioning and may also waive any defect relating to judicial officer who presided over voir dire of petit jurors, and where no contemporaneous objection was made to jury selection process, the objection would not be considered for first time on appeal. U.S.C.A. Const. Art. 3, § 1 et seq.; 28 U.S.C.A. §§ 631 et seq., 636.

Edgar Paul Boyko, San Diego, Cal. (Miller, Boyko & Bell, San Diego, Cal., and Albert J. Brackley, Brooklyn, N.Y., on the brief), for defendant-appellant DeFiore.

Phylis Skloot Bamberger, Legal Aid Society, Public Defender Services Unit, New York City, for defendant-appellant Coppola.

Max Sayah, Asst. U.S. Atty., Brooklyn, N.Y. (Raymond J. Dearie, U.S. Atty., and Mary McGowan Davis, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), for appellee.

Before NEWMAN and WINTER, Circuit Judges, and MALETZ, Senior Judge.*

MALETEZ, Senior Judge:

*Of the United States Court of International Trade, sitting by designation.

Defendants-appellants Paul DeFiore, Joseph Coppola and Robert Galler were convicted under a ten count indictment which alleged a scheme to defraud the Department of Taxation and Finance, State of New York, and the Finance Department, City of New York, of substantial cigarette tax revenues. The scheme allegedly involved secretly transporting cigarettes from North Carolina to New York on which no New York cigarette taxes had been paid, and thereafter selling them in New York. Ten telephone calls, corresponding to the ten counts charged in the indictment, allegedly brought the scheme within the federal wire fraud statute, 18 U.S.C. § 1343 (1976).[1] Defendants DeFiore and Galler were convicted on all ten counts, defendant Coppola on all but counts five and eight.

Defendant DeFiore advances essentially five arguments in support of his appeal. He first argues that the wire fraud statute was not intended for the prosecution of schemes designated to violate state tax laws. Assuming the applicability of the wire fraud statute here, DeFiore's second contention is that the evidence offered at trial to prove either a scheme to defraud or use of the wires was insufficient.

The balance of DeFiore's arguments are all addressed to an assortment of alleged trial defects which, he contends, require reversal: (1) a purportedly erroneous supplemental charge by the trial court in response to a jury question, (2) the admission into evidence of prior similar acts by DeFiore predating the commencement of the statute of limitations, and (3) prosecutorial misconduct in the form of leading questions to government witnesses and prejudicial summation.

Defendant Coppola raises two arguments on his appeal. First, he submits, the government failed to adduce sufficient evidence of his knowing participation in the fraudulent scheme. Coppola further contends that voir dire of prospective jurors by the United States magistrate, even

1. 18 U.S.C. § 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Defendants were also indicted under 18 U.S.C. § 2 which provides in part:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

though conducted pursuant to local court rule, was violative of the Magistrates Act, 28 U.S.C. § 636, and Article III of the Constitution.

Defendant Galler has filed no briefs, but by letter of counsel has adopted the points raised by his co-defendants.

For the reasons that follow, we reverse the convictions of defendants DeFiore and Galler on counts five and eight of the indictment. In all other respects, the judgments of conviction are affirmed.

I

Background

The scheme to defraud was fairly simple in nature. As testified to by John Cox, the president of Piedmont Wholesale Company (Piedmont), a North Carolina wholesale distributor of cigarettes, Piedmont was authorized to affix only North Carolina tax stamps on cigarettes. Nevertheless, in 1974 Cox and DeFiore struck a deal whereby DeFiore and Galler would place telephone orders with Cox for cigarettes to be transported to New York but which were untaxed under New York law. At that time the North Carolina tax on cigarettes was two cents per pack compared to the New York tax of 23 cents per pack. The cost to defendants was slightly higher than the price of cigarettes generally charged by Piedmont, but less than the price of cigarettes in New York. In this way the parties to the scheme would be able to realize a mutual profit.

Initially, DeFiore carried cash—in the range of $20,000—to North Carolina from New York to pay for the cigarettes. Shortly thereafter, at DeFiore's suggestion, Cox opened a bank account at First National City Bank in Brooklyn in the name of Piedmont in order to eliminate the inconvenience of transporting large sums of cash to North Carolina. Two employees of that bank testified that DeFiore made weekly cash deposits to the Piedmont accounts. Using the bank's customer service number, Cox would verify that a deposit had in fact been made to that account. Telephone toll records of Piedmont reflecting the dates of long-distance calls to the bank coincided with the dates of DeFiore's large cash deposits.

Both DeFiore and Galler ordered cigarettes from Cox. After confirming DeFiore's deposit to Piedmont's account Cox would release the cigarettes. Some packs of cigarettes which Cox sold bore North Carolina stamps, but others bore no stamps whatsoever. Cox testified that as for

this latter group, the tax stamps were destroyed, although the North Carolina taxing authorities had been paid the two-cent-per-pack tax. The orders were packed at the Piedmont warehouse in High Point, North Carolina, ten packs of cigarettes to a carton, thirty cartons to a case. Each case was constructed of plain brown cardboard sealed with brown tape, marked only by numbers. There were no distinguishing marks on the cases to indicate to the casual observer that they contained cigarettes. Once packed, the cases of cigarettes were moved from High Point to a barn owned by a Piedmont employee, Howard Sechrest, for subsequent loading and shipment. These loading and shipment operations were not in the normal course of Piedmont's business.

As part of the arrangement between Cox and DeFiore, Cox purchased two vans and a truck. The latter vehicle was ostensibly designed to carry four-inch diameter pipe, but had been specially designed to secretly transport cases of cigarettes. The truck, bearing the marking "Tri-State Plumbing" on the cab door, had a removable side panel which concealed an interior compartment. This truck had been registered to several different persons, including Galler, and was last registered in New Jersey under the name of Tri-State Plumbing Company. The vehicle's certificate of ownership was signed by Joseph Coppola on behalf of Tri-State. A certificate of doing business issued by the State of New Jersey to Tri-State Plumbing Supply Company was also signed by Coppola in the capacity of owner. As it turned out, Tri-State's New Jersey business address on the latter certificate was fictitious.

Once loaded at Sechrest's barn the trucks would be driven to New York. Testimony was adduced that the trucks were unloaded at a warehouse in Brooklyn, and that Galler assisted in the unloading. An agent of the Bureau of Alcohol, Tobacco and Firearms testified that on April 4, 1978 he observed the pipe truck leave the Brooklyn warehouse and cross the Verrazzano Narrows Bridge. On April 6 he observed Coppola driving the truck into the warehouse.

Other evidence of Coppola's involvement shows that on one occasion a Piedmont employee, Wayne Sexton, drove the pipe truck loaded with cigarettes to a truck stop in Warrington, Virginia, where he switched vehicles with Coppola. Sechrest testified that defendant Coppola was present when the pipe truck was loaded at his barn. Coppola was further identified by Sechrest as one of the drivers who picked up cigarettes. The government produced receipts signed by Coppola evidencing that he had stayed at a motel in North Carolina on six occasions in 1978.

Finally, a government witness testified that during 1978 he regularly purchased cartons of cigarettes without New York tax stamps from Galler.

With this background we first consider DeFiore's contention that the federal wire fraud statute may not be utilized to prosecute schemes to defraud a state of taxes due it.

II

The Applicability of the Wire Fraud Statute

[1,2] DeFiore's argument that section 1343 was not intended to cover the fact situation alleged in the indictment is two-fold in nature. First, he submits, the wire fraud statute should not apply to schemes to defraud federal or state governments of taxes due them. As a corollary DeFiore adds that the indictment here is a thinly veiled effort to prosecute as a federal offense acts which clearly are a violation of state law.

We find no room for agreement with DeFiore. Indeed, four circuits before us have squarely applied the federal fraud statutes to state tax law violations. *See United States v. Melvin*, 544 F.2d 767 (5th Cir.1977) (mail fraud in connection with interstate sale of cigarettes); *United States v. Brewer*, 528 F.2d 492 (4th Cir.1975) (same); *United States v. Mirabile*, 503 F.2d 1065 (8th Cir.1974) (mail fraud in connection with false state tax return), *cert. denied*, 420 U.S. 973, 95 S.Ct. 1395, 43 L.Ed.2d 653 (1975); *and United States v. Flaxman*, 495 F.2d 344, 349 (7th Cir.) ("Just because the State . . . was the victim and makes such a scheme illegal does not preclude the Federal Government from prosecuting the perpetrators under . . . federal law"), *cert. denied*, 419 U.S. 1031, 95 S.Ct. 512, 42 L.Ed.2d 306 (1974). Moreover, *United States v. Henderson*, 386 F.Supp. 1048 (S.D. N.Y. 1974), upon which defendant places great reliance, involved the use of section 1343 in connection with a *federal* income tax fraud prosecution. *Cf. United States v. Miller*, 545 F.2d 1204, 1216 n. 17 (9th Cir. 1976) (*Henderson* rejected in the context of federal tax violations), *cert. denied*, 430 U.S. 930, 97 S.Ct. 1549, 51 L.Ed.2d 774 (1977).

Section 1343 on its face is not limited in the manner suggested by DeFiore, nor does it purport to exempt the conduct in which he engaged. It plainly applies to "*any* scheme or artifice to defraud" in which the jurisdictional means—the wires—are employed. Its focus is upon the

misuse of the wires, not the regulation of state affairs. Congress clearly has the authority to regulate such misuse.[2] *See Brewer*, 528 F.2d at 495; *Mirabile*, 503 F.2d at 1067. In short, principles of federalism do not provide a basis for reversal. *See also United States v. Corey*, 566 F.2d 429, 430-31 & n. 2 (2d Cir.1977) (defendant's claim of improper federal jurisdiction over what is essentially a state offense is "wholly without merit" and "frivolous").

III

Sufficiency of the Evidence

[3] We turn next to a consideration of DeFiore's and Coppola's claim that the evidence was insufficient to convict them as a matter of law. A defendant advancing a claim based on insufficiency of the evidence bears a very heavy burden. *See, e.g., United States v. Carson*, 702 F.2d 351, 361 (2d Cir.1983); *United States v. Losada*, 674 F.2d 167, 173 (2d Cir.), *cert. denied*, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982). Our inquiry is

> whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt. . . . In making this determination, we must view the evidence in the light most favorable to the government, . . . and construe all permissible inferences in its favor, . . .

Carson, 702 F.2d at 361 (citations omitted).

Applying this standard of review to the facts in this case we are left with the firm conviction that, with the exception of counts five and eight

2. When Congress enacted the Jenkins Act, 15 U.S.c. §§ 375-378 (1976)—which requires cigarette distributors to file reports to appropriate state authorities—it voiced no objection to prosecutions under the wire or mail fraud statutes in connection with state cigarette tax evasion. *See* S.Rep. No. 1147, 84th Cong., 1st Sess. (1955), *reprinted in* 1955 U.S.Code Cong. & Ad.News 2883-85.

Nor did Congress voice such objection in 1978 when it passed 18 U.S.C. §§ 2341-2346 (Supp. IV 1980), entitled "Trafficking in Contraband Cigarettes". *See* S.Rep. No. 962, 95th Cong., 2d Sess. (1978), *and* H.R.Rep. No. 1629, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.Code Cong. & Ad.News 5518-35. In fact, Congress expressed no preference for which federal law should be employed to curb the bootlegging of cigarettes. Congress did make it clear, however, that by passage of this statute it was increasing the avenues available to federal law enforcement personnel by which they could counteract the rapidly growing illegal cigarette trade. *Id. See also United States v. Melvin*, 544 F.2d 767, 774 & n. 14 (5th Cir. 1977); *United States v. Brewer*, 528 F.2d 492 (4th Cir.1975).

of the indictment, the government presented sufficient evidence upon which a reasonable jury could find the existence of a scheme to defraud and use of the wires in furtherance thereof beyond a reasonable doubt as to all three defendants.

A

The Evidence Against DeFiore

[4] Based on the entire record presented here, in particular the telling testimony of Cox describing the raison d'etre for the Brooklyn bank account, the specially designed pipe truck with the false compartment, and the destruction of the North Carolina tax stamps at the time cigarettes were sold to DeFiore, coupled with other testimony showing that untaxed cigarettes were unloaded and sold in New York City, DeFiore's claim of insufficiency as to the scheme to defraud is untenable. *See, e.g., United States v. Von Barta*, 635 F.2d 999, 1005-06 n. 14 (2d Cir.1980) ("Government need not show that the scheme's victims were in fact defrauded . . . [only] that some actual harm or injury was at least contemplated"), *cert. denied*, 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981); *United States v. Curtis*, 537 F.2d 1091, 1095 (10th Cir.) ("it is not necessary to show that any person was in fact defrauded"), *cert. denied*, 429 U.S. 962, 97 S.Ct. 389, 50 L.Ed.2d 330 (1976); *United States v. Reicin*, 497 F.2d 563 (7th Cir.), *cert. denied*, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974). *See also United States v. Tramunti*, 500 F.2d 1334, 1338 (2d Cir.) ("the evidence . . . must be viewed in light of the totality of the Government's case, since one fact may gain color from others"), *cert. denied*, 419 U.S. 1079, 95 S.Ct. 667, 42 L.Ed.2d 673 (1974).

DeFiore's contention that the government failed to prove the content of the telephone calls by sufficient evidence must fail. Given the devastating testimony of Cox that he called the bank regularly to verify that DeFiore had made the cash deposits, together with the telephone toll records, bank deposit slips, and testimony of bank tellers who took DeFiore's deposits, a strong link was established between the scheme to defraud and the eight transmissions by wire from North Carolina to Brooklyn. There was thus proof sufficient to convict on these eight counts.

We find baseless DeFiore's argument that the government failed in its proof simply because Cox could not recall the specific content of

individual telephone calls made four to five years prior to trial. While it is true that the government has the burden of proving the contents of the telephone calls, proof of that may be established by circumstantial evidence. *See, e.g., United States v. Garner*, 663 F.2d 834, 838 (9th Cir.1981). And it is clear from the evidence that the government met its burden of proving that the calls from Piedmont to Brooklyn were "for the purpose of" committing wire fraud. *See United States v. Tramunti*, 500 F.2d at 1338. For Cox testified that he clearly remembered telephoning Brooklyn regularly to verify whether deposits had been made to the Piedmont account. In our view, this testimony, when juxtaposed with the dates of DeFiore's bank deposits and the dates of long-distance calls to Brooklyn from Piedmont, leads to the inescapable inference that Cox telephoned Brooklyn on the eight occasions listed in the indictment in order to verify DeFiore's deposits to Piedmont's account.

In sum, the eight telephone transmissions from Piedmont to New York bore a sufficient connection to the realization of the scheme to be considered as made for the purpose of executing the scheme, *United States v. Pollack*, 534 F.2d 964, 971 (D.C. Cir.), *cert. denied*, 429 U.S. 924, 97 S.Ct. 324, 50 L.Ed.2d 292 (1976), and to support conviction on separate counts. *Id.* at 971-72; *Melvin*, 544 F.2d at 770-77 & n. 5. The jury could permissibly infer from the telephone and bank records and from Cox' total testimony that the calls from Piedmont to New York listed in the indictment were made to verify the bank deposits.

By contrast, we agree with DeFiore's contention insofar as counts five and eight of the indictment are concerned. Those two counts are based on collect calls from a telephone number in Garden City, New York to Piedmont. However, no nexus was shown between those two calls and the scheme to defraud. In fact, there was no evidence linking those calls to any of the defendants, either in connection with verifying a deposit to Piedmont's Brooklyn bank account or with placing a cigarette order. Indeed, it was not even shown that the telephone number in question was listed in any of defendants' names. Accordingly, the convictions of DeFiore and Galler on counts five and eight of the indictment are reversed.

B

The Evidence Against Coppola

[5] The proof of Coppola's knowing participation in the illicit scheme is also sufficient to sustain his conviction. His basic contention is that inasmuch as the cigarettes were packaged in plain brown cardboard cartons he cannot be charged with knowledge that he was transporting untaxed cigarettes.

On this record we find ample evidence from which a jury could reasonably infer that Coppola was aware of the nature of the goods concealed within the truck. For one thing, Coppola was present when the pipe truck was loaded in North Carolina with cigarettes into the secret compartment. He was seen driving the pipe truck on April 6, 1978. Moreover, he continued to drive to North Carolina after that date, as evidenced by six signed motel registrations dated from April 25, 1978 to October 30, 1978. Further, Coppola was the registered owner of two Tri-State Plumbing trucks, one of which was the bogus pipe truck, and was also the registered owner of Tri-State Plumbing Company.

To be an aider and abettor under 18 U.S.C. § 2, it was not necessary that Coppola know all the details of the criminal venture to be considered a participant in its criminal purpose, *cf. United States v. Garguilo*, 310 F.2d 249, 253 (2d Cir.1962). For on the basis of the evidence detailed above, a jury was entitled to infer that Coppola, frequently the driver of the truck with the concealed compartment, would have known its contents and had knowledge of the criminal venture when he signed the vehicle registration and the certificate of doing business for Tri-State Plumbing. Thus, it is clear that Coppola satisfies the requirements this court has established for the offense of aiding and abetting: "'that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" *United States v. Bommarito*, 524 F.2d 140, 145 (2d Cir.1975) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir.1938)).

We turn next to DeFiore's claim of trial errors.

IV

The Alleged Trial Defects

DeFiore assigns as reversible error a supplemental charge given in response to a jury question, the admission into evidence of similar acts predating the statute of limitations, the use of leading questions by the Assistant United States Attorney during his direct examination, and prejudicial summation.

[6] In the supplemental charge the trial judge further defined the wire fraud law. The only objection to it was that the judge did not fully explain how that charge related to the ten counts of the indictment—which he then immediately did. In none of this do we see any error, much less plain error.

[7] DeFiore's second alleged trial error is equally without merit. He contends that it was improper for the trial court to permit the introduction into evidence of acts and transactions prior to the five-year statute of limitations period. This contention is easily disposed of. Rule 404(b) of the Federal Rules of Evidence provides:

> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Clearly, the prior act evidence adduced here went directly to establishing DeFiore's intent, as well as the preparations and plans that went into the scheme to defraud, *see Corey*, 566 F.2d at 431 & n. 4, and such evidence is admissible even though it antedates the limitations period. *United States v. Ashdown*, 509 F.2d 793, 798 (5th Cir.), *cert. denied*, 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed.2d 47 (1975); *United States v. Blosser*, 440 F.2d 697, 699 (10th Cir.1971).

[8] DeFiore's final contention regarding prosecutorial misconduct is likewise unavailing. Fed.R.Evid. 611(c) states that "[l]eading questions *should not* be used on the direct examination of a witness except as may be necessary to develop his testimony." (Emphasis added). These are words of suggestion, not command. In addition, as indicated in the Advisory Committee's Note to this rule, "[a]n almost total unwillingness to reverse for infractions has been manifested by appellate courts." As for

allegedly prejudicial summation by the government attorney the absence of a contemporaneous objection or even a request for a cautionary instruction obviates our need for considering DeFiore's bare claim of prejudice. *See Malley v. Manson*, 547 F.2d 25, 28 (2d Cir.1976), *cert. denied*, 430 U.S. 918, 97 S.Ct. 1335, 51 L.Ed.2d 598 (1977).

V

Jury Voir Dire by the Magistrate

[9] We address finally Coppola's argument that the voir dire of prospective jurors in this case was improperly delegated to the federal magistrate contrary to 28 U.S.C. § 636 (1976) and Article III of the Constitution. Local court rule 25 of the Eastern District of New York authorizes magistrates to conduct voir dire of petit jurors. Coppola argues, however, that the delegation of certain duties to a magistrate in felony cases extends only to pretrial matters under the Magistrates Act, and that the selection of a jury is not a pretrial matter. *See The Virgin Islands v. George*, 680 F.2d 13, 15 (3d Cir.1982).

However, no contemporaneous objection was made to the jury selection process. We, therefore, see no reason to consider this objection for the first time on appeal. *See United States v. Lieberman*, 608 F.2d 889, 900 (1st Cir.1979), *cert. denied*, 444 U.S. 1019, 100 S.Ct. 673, 62 L.Ed.2d 649 (1980). What is more, since a defendant may waive his right to be present during the period of often routine voir dire questioning, *see The Virgin Islands v. George*, 680 F.2d at 15; *The Virgin Islands v. Brown*, 507 f.2d 186, 189 (3d Cir.1975), we believe it would be anomalous to hold that a defendant could not also waive any defect relating to the judicial officer who presided over the voir dire of petit jurors.

VI

For the foregoing reasons, the judgments of conviction of defendants DeFiore and Galler are reversed as to counts five and eight. In all other respects, the judgments of conviction are affirmed.

WINTER, Circuit Judge, concurring in part and dissenting in part:

The indictment was framed to allege ten counts, each of which involved a particular phone call placed on a particular date. Two of the calls

were never connected to the defendants and I concur in the majority's dismissal. The remaining eight calls were all placed from a particular phone in North Carolina to a bank in New York. The indictment alleged that each of these calls was a separate crime since each furthered a single scheme to defraud the State and City of New York and to deprive these authorities of tax revenue due on the sale of cigarettes.

The evidence showed that the defendants were engaged in purchasing cigarettes without a North Carolina tax stamp for resale. The seller customarily confirmed by phone that the purchase money had been deposited in a particular bank account in New York. Each of the eight counts involves such a phone call. The cigarettes were then loaded either into a truck camouflaged so as to make it appear that it was carrying pipe or into vans of ordinary appearance. Some of the cigarettes were transported to New York City and sold there. However, as the government conceded on oral argument, there was no proof as to where the great bulk of the cigarettes were transported and sold, and no connection was made between any one of the phone calls named in each count and the transportation and sale of cigarettes in New York.

Analysis must begin with the question of what the government was required to prove under the indictment as framed. Had the indictment alleged in one count a conspiracy to commit wire fraud, the proof was clearly sufficient. Had the indictment alleged in one count a scheme to defraud New York City and New York State of tax money and the use of the wires in furtherance of the scheme, the proof was also sufficient. Had the evidence shown that each call resulted in the use of the camouflaged truck to transport cigarettes to New York for resale there, I would join the majority in affirming the eight counts on the grounds that a deceptive act resulting in a fraud of New York had been proven.

Under the caselaw cited by the government, it must prove a scheme involving a false statement or other deception intended to cause a designated governmental authority to lose tax revenue. All the evidence showed, however, was a scheme to purchase and, presumably, sell cigarettes without a tax stamp. If deception of New York was proven, it was only in the occasional use of the camouflaged truck, one trip in that truck to New York City, and the sale of a small number of cigarettes there. None of the calls alleged in the eight counts involved the truck, the trip to New York or the sales. As framed, therefore, the indictment thus raises the very troublesome question of whether each and every use of the wires in any connection with a single scheme to defraud can be alleged and proven as a separate count.

Although there appears to be little authority directly on point, it would seem to me that some line drawing is in order. Congress surely did not intend that the exposure to criminal liability should be so dependent upon the number of phone calls or wire transmissions made. For one thing the exposure is entirely random not only because small frauds may include multiple uses of the wires while large ones do not, but also because relatively innocuous uses of the wires are as criminal as those actually involving fraudulent communications. The theory of the government would render as criminal a would-be swindler's phoning for a pizza to allow him to eat while working as a call which is itself a fraudulent act. For another, the constitutional protection against double jeopardy becomes relatively meaningless since successive prosecutions need only allege different calls.

Such line drawing is not difficult. For example, the Congressional purpose would be fully effectuated by allowing a separate count for each conspiracy, a count for each scheme to defraud utilizing wire transmissions, and a separate count for each actual fraudulent act utilizing a wire transmission.

Under such a rule, the eight count indictment in the present case was not proven. Having chosen to frame the indictment as it did, the government was obligated to prove each element on each count. *United States v. Robinson*, 545 F.2d 301 (2d Cir.1976). This it failed to do. First, there is no proof that the cigarettes purchased as a result of any of the eight phone calls were sold in New York. That the laws, tax or otherwise, of that state or some other were violated, is simply assumed. Second, there has been no proof of either deception or a false statement in connection with any particular phone call. An act of deception might have been proven had the government shown use of the camouflaged truck in connection with the eight phone calls but it did not.

The legal theory of the conviction, therefore, is either that every use of the wires with some connection to a single scheme to defraud is a crime or that a wire fraud is made out by the use of a phone in connection with the simple non-payment of state or local taxes without proof either of deception or the identity of the taxing authority involved. I cannot accept

either theory and, therefore, dissent.[1]

1. Affirmance renders into insignificance the Jenkins Act, 18 U.S.C. §§ 2341 *et seq.*, a federal criminal statute which specifically regulates trafficking in contraband cigarettes. This legislation, intended to provide federal assistance to states in collecting revenue due for the sale of cigarettes, spells out in detail the kinds of trafficking in contraband cigarettes which Congress believed to be sufficiently serious to call for federal intervention. For example, more than 60,000 cigarettes must be involved which contain no evidence of compliance with the state law where they are found if the particular state requires a procedure such as stamping. If the wire fraud legislation reaches every non-payment of state taxes on cigarettes, however, no federal prosecutor will ever have a reason to use the Jenkins Act even though it, rather than the wire fraud statute, is the product of Congressional study of the problem of contraband cigarettes.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 82-1447

UNITED STATES OF AMERICA,

Appellee,

--against--

PAUL DeFIORE,

Appellant.

PETITION FOR REHEARING

To: The Honorable Judges of the United States Court of Appeals for the Second Circuit:

Petition For Rehearing

Pursuant to Fed. R. App. P., Rule 40, petitioner, Paul DeFiore, appellant herein, respectfully petitions the Judges of this honorable Court for a rehearing of the appeal in the above-entitled cause. In support of this Petition, petitioner states that:

1. **Indictment/Background:** The ten (10) count Indictment herein alleges a scheme by Paul DeFiore ("DeFiore") to defraud the City and State of New York of substantial cigarette tax revenues. The scheme allegedly involved transporting cigarettes from Piedmont, a company in North Carolina, to New York where they were sold without New York cigarette taxes being paid.

The Indictment specifically alleges that DeFiore, in conjunction with co-defendants, Robert Galler, Joseph Coppola and Lawrence Kerns (charges against Kerns were dismissed), transported or caused to be

transported from North Carolina to New York approximately 2,404,738 cartons of cigarettes, thereby defrauding the City and State of New York of approximately $5,530,897.00 in cigarette tax revenues. As part of the scheme, substantial cash deposits were made in Piedmont's account at the Citibank, Brooklyn Branch. Thereafter, persons from Piedmont telephoned Citibank to verify the cash deposits. Ten (10) telephone calls from Piedmont to Citibank, corresponding to the ten (10) counts of the Indictment, allegedly brought the scheme under the Wire Fraud Statute, 18 U.S. Code § 1343. The district court convicted DeFiore on all ten (10) counts.

2. **Decision:** On November 2, 1983, this Circuit Court reversed conviction of DeFiore on counts five and eight of the Indictment. In all other respects, the Judgment of Conviction was affirmed.

In affirming the judgment as to the remaining eight (8) counts, the Court rejected DeFiore's argument that it was improper for the Government to apply the wire fraud statute to an alleged scheme to defraud payment of taxes to a state government, especially where the Wire Fraud Statute was used to reach the same offense as proscribed by specific federal statute and where the overall effect was to increase the penalty upon conviction.

3. **Summary of Evidence:** John Cox, president of Piedmont, the North Carolina wholesale distributor of cigarettes, testified that Piedmont was authorized to affix North Carolina stamps on cigarettes. The North Carolina tax was two cents ($.02) per pack compared to the New York cigarette tax of $.23 per pack. In 1974, DeFiore began purchasing cigarettes from Piedmont. Cox opened a bank account at Citibank, Brooklyn Branch, in the name of Piedmont in order to eliminate the inconvenience of having to transport large sums of cash to North Carolina.

Using the Citibank's customer service number, Piedmont verified the deposits. Piedmont's telephone toll records were admitted into evidence through the testimony of Federal Bureau of Alcohol, Tobacco and Fire Arms agent, Napoli. Napoli testified that deposits were made in the Citibank account within three (3) to ten (10) days of a telephone call from Piedmont to Citibank. After confirming the deposit, Piedmont shipped the cigarettes. The cigarettes sold often bore North Carolina cigarette stamps. Cox testified that his conduct did not violate any state or federal laws.

To deliver the cigarettes, Cox purchased two vans and a truck. Testimony was adduced that the truck was seen at a warehouse in New York on one occasion in or about April 1978. Finally, a witness testified that during 1978 he purchased cigarettes without New York stamps from Galler.

4. In rejecting DeFiore's argument that the Government should not be permitted to apply the Wire Fraud Statute to an alleged scheme to defraud state governments of taxes especially where the Statute is used to reach the same offense otherwise proscribed by federal statute and to increase the penalties in the event of conviction, this Court cited four cases from other Circuits[1] that applied the Mail Fraud Statute to enforce state tax laws. DeFiore relies upon *United States v. "Skitch" Henderson*, 386 F.Supp. 1048 (S.D. N.Y. 1974), discussed below, to support his argument for dismissal. The Court has, through its decision, impliedly adopted and affirmed *Henderson*. Nonetheless, the Court distinguished *Henderson* in that it "involved the use of § 1343 [the Wire Fraud Statute] in connection with a *federal* income tax fraud prosecution," and therefore, the Wire Fraud Statute could be applied to state tax fraud. [Emphasis not added.]

5. For reasons discussed in greater detail, below, including that *Henderson* is *not* an 18 U.S. Code § 1343 (wire fraud) case, DeFiore submits that the Court overlooked or misapprehended the law and facts relating to the present matter.

6. **The Government Should Not Be Permitted to Apply the Wire Fraud Statute where Congress has Enacted Particularized Legislation Dealing Directly with Schemes to Defraud States of Tax Revenues Resulting from Contraband Cigarettes:** In *United States v. Henderson, supra*, 388 F.Supp. at pp. 1050-1051, Skitch Henderson was indicted for evasion of federal income taxes. The counts were based upon a letter and two income tax returns mailed by Henderson.

The district court, the Honorable Edward Weinfeld, dismissed the three mail fraud counts, holding that they were beyond the scope and purpose of the Statute which was specifically limited to protecting the

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[1] *United States v. Mirabile*, 503 F.2d 1065 (8th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975), *United States v. Flaxman*, 495 F.2d 344 (7th Cir. 1974), *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975), and *United States v. Melvin*, 544 F.2d 767 (5th Cir. 1977).

public against various fraudulent schemes. Judge Weinfeld noted that *application of the mail fraud statute has generally been "confined to schemes of a type designed to defraud members of a community at large,* in the sale of commodities and services, *rather than schemes to defraud the government." Id.*

Moreover, Chief Justice Burger of the United States Supreme Court stated in *United States v. Maze*, 414 U.S. 395, 405-406, 94 S.Ct. 645, 651, 38 L.Ed.2d 603 (1974), (dissenting opinion), that the mail fraud statute:

> . . . has traditionally been used against fraudulent activity as a first line of defense. *When a "new" fraud develops* -- as consistently happens -- *the mail fraud statute becomes a stop-gap device to deal on a temporary basis with a new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil.* [Emphasis added.]

Citing *Maze, supra*, the *Henderson* district court dismissed the mail fraud counts, finding that there was no need to use the mail fraud statute as a "stop-gap device" until "particularized legislation" was enacted "to deal directly with the evil" of avoiding payment of the taxes since Congress had enacted legislation. 386 F.Supp. at p. 1053. *Henderson* should not be narrowly interpreted to relate only to federal taxes.

7. Statutes, such as 18 U.S. Code § 1341 or 1343, should be *carefully and strictly construed in order to avoid extension beyond the limits intended by Congress*. Such construction is necessary where the Government urges the Court to construe a federal criminal statute so that it reaches conduct which the *states* should appropriately control. *United States v. Kelem*, 416 F.2d 346, 347 (9th Cir. 1969). *See also, United States v. Louderman*, 576 F.2d 1383, 1388 (9th Cir. 1978).

8. The *Mirabile* and *Flaxman* decisions improperly "broadly and liberally" applied the Wire Fraud Statute, and they pre-date *Henderson. Mirabile, supra*, 503 F.2d at p. 1066. Moreover, the *Mirabile* and *Flaxman* (false tax return cases) decisions, and the *Brewer* and *Melvin* (mail order cigarettes), pre-date the Trafficking and Contraband Cigarettes Act, 18 U.S. Code § 2341, *et seq.*, particularized federal legislation relating to interstate cigarette bootlegging and the resultant loss of cigarette tax revenues to the states, as discussed in Paragraph 9, below.

Moreover, in the *Mirabile-Flaxman-Brewer-Melvin* line of cases, "the essential part" of the schemes was brought about through the *medium of the United States mails.*

9. **Particularized Federal Legislation Relating to Enforcement of State Cigarette Tax Laws:** The Jenkins Act, 15 U.S. Code § 375, *et seq.* enacted October 19, 1949, requires any persons selling or disposing of cigarettes in interstate commerce to forward to state tobacco tax administrators a memorandum identifying to whom shipments are made. Violation of the Jenkins Act is a *misdemeanor* punishable by a fine of not more than $1,000.00, or imprisonment for not more than six months, or both. 15 U.S. Code § 377.

The purpose of the Jenkins Act is *to assist the States in collecting state-imposed sales and use taxes on cigarettes.* S. Rep. No. 644, July 11, 1949. In particular, the need for such legislation was because: "The avoidance of State sales and use taxes on cigarettes by interstate shipments to consumers in States taxing cigarettes is depriving the States of large amounts of sorely needed revenue." In addition: "A further objection to this technique of avoiding State-imposed cigarette taxes is the fact that the United States *mails* are used to accomplish the avoidance."

On November 2, 1978, the Trafficking and Contraband Cigarettes Act, 18 U.S. Code § 2341, *et seq.* (hereinafter the "Trafficking Act") was enacted. The Act makes it unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes. "Contraband cigarettes" are defined as a quantity in excess of 60,000 cigarettes which bear no evidence of payment of the applicable State cigarette taxes. 18 U.S. Code §§ 2342(a) and 2341. Violation of the Trafficking Act is punishable by a fine of not more than $100,000.00, or imprisonment for not more than five (5) years, or both. 18 U.S. Code § 2344.

The purpose of the Trafficking Act is to provide a timely solution to the "serious problem" of "interstate cigarette bootlegging and to help provide law enforcement assistance and relief to cities and States." S. Rep. No. 95-962, June 28, 1978, p. 3. The Senate defined the scope of the problem as follows: "Since 1965 cigarette bootlegging has become a serious problem for a number of States in the areas of tax administration and law enforcement." The Report noted that during 1976, New York lost approximately 72.3 million dollars in taxes because of cigarette

bootlegging. *Id.* at p. 5. As a result, the Cigarette Trafficking Act became law.[2]

The Court's Decision herein renders into insignificance the Jenkins and Trafficking Acts. Moreover, it is clear that Congress has enacted increasingly particularized legislation dealing with the enforcement of state cigarette tax laws. In particular, the Trafficking Act relates to contraband cigarettes. In the present case, the Government alleges that approximately 2,404,738 *cartons* of cigarettes were transported from North Carolina to New York. Since specific legislation exists relating to bootlegged cigarettes, the Government was compelled to prosecute under either the Jenkins or Trafficking Acts.

10. **Wire Fraud Counts Were Impermissibly Used by the Government to Increase Penalty:** This Court has repeatedly expressed "misgivings" over the Government's use of the Mail Wire Fraud statutes as a basis for additional counts in an indictment the gravamen of which was violation of other federal criminal statutes. *United States v. Mangan*, 575 F.2d 32, 49 (2nd Cir. 1978), and *United States v. Dixon*, 536 F.2d 1388, 1401 (2nd Cir. 1976).

Henderson, supra, 386 F.Supp. held that the Government's use of the Mail Fraud Statute to provide additional counts upon essentially the same allegations as required to sustain tax evasion improperly permitted the "pyramiding of sentences in the event of conviction." As a result, District Judge Weinfeld dismissed the three (3) wire fraud counts because they were "impermissibly used" by the Government in an attempt to reach the same offenses and increase the same penalties in the event of conviction, beyond the intent of Congress.[3]

In the present matter, had DeFiore been convicted under the Jenkins Act, it would have been a misdemeanor requiring a fine of $1,000.00

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[2] Note: 18 U.S.C. § 2345 specifically provides that the Trafficking Act does not affect the concurrent jurisdiction of a State to enact and enforce cigarette tax laws, and to provide for penalties for violation of such laws. 18 U.S. Code § 2345.

[3] District Judge Weinfeld noted that: "The policy of the prosecution of fragmentizing charges which center about the filing of an alleged false tax return, by applying the mail fraud statute under three separate counts, two of which include the mailing of the very income tax returns at issue, with the result that *a conviction would permit multiple sentences reaching staggering, if not utterly unrealistic, years of imprisonment, has its outer limits*. In my view the outer limits were set by Congress. . . ." [Emphasis added.]

and/or imprisonment of not more than six months. Under the Trafficking Act, he would have been sentenced to a $100,000.00 fine and/or imprisoned for a period of not more than five (5) years. Under Article XX of New York Tax Law, § 481, mentioned in the Indictment, the penalty for violation is imprisonment of not more than one (1) year (a misdemeanor). By contrast, DeFiore was prosecuted for ten (10) counts of Wire Fraud, carrying a potential sentence of $10,000.00 in fines and/or fifty (50) years in prison. It is not difficult to see the unreasonable and arbitrary sentencing parameters, and potential for abuse, available under the Wire Fraud Statute.

10. **The Government Failed to Prove its Case as to Each Count of the Indictment:** A jury must consider the defendant's guilt or innocence as to *each count of the indictment separately*. 1 E. Devitt and C. Blackmar, Federal Jury Practice and Instructions, § 17.02 (2nd Ed. 1970). Moreover, the Government is obligated to prove each element of each count of the Indictment, or the count(s) must be dismissed. *United States v. Robinson*, 545 F.2d 301, 304 (2nd Cir. 1976).

In the instant matter, two of the phone calls in the Indictment were never connected to the defendants, and as a result, two (2) counts were dismissed by the Court. The Indictment alleges that each of the calls was a separate crime since each furthered a single scheme to defraud New York of cigarette tax revenues.

It is important to note that *the Government conceded on oral argument that there was no proof as to where the great bulk of the cigarettes were transported and sold*. In addition, the Government further conceded that it failed to establish a nexus or connection between any particular phone calls in the Indictment and the transportation and sale of cigarettes in New York. The Government acknowledges in its authorities that it was required to prove a scheme involving a false statement or other deception intended to cause New York to lose tax revenues. All the evidence showed, however, was a scheme to purchase, and presumably, sell cigarettes without a tax stamp. If deception of New York was proven, it was only in the occasional use of a camouflaged truck (one trip in that truck to New York City in April 1978), and the sale of a small number of cigarettes there. *None of the calls alleged in the eight counts involved the truck, the trip to New York, or the cigarette sales.*

Having chosen to frame the Indictment as it did, the Government was obligated to prove each element on each count. *Robinson, supra*, 545

F.2d at 304. It failed to meet its burden of proof here in that there was no proof that the cigarettes were purchased as a result of any of the eight phone calls and sold in New York. Second, there was no showing that the laws, tax or otherwise, of New York or any other state were violated; but rather, this was assumed by the jury. Finally, there was no proof of either deception or a false statement in connection with any particular phone call.

The important question presented on appeal is *whether each and every use of the wires in any connection in a single scheme to defraud* can be alleged and proven as a separate count. As the dissent noted, "some line drawing is in order."

The transcript further suggests the Government's failure to prove its case. In specific response to the district court's expression of concern as to proof of its case, the Government stated that:

> *No one is able to state that the cails were made in furtherance of the conspiracy.* The Government is asking because bank deposits were made, that must mean every call was made in that connection. [Emphasis added.]

The district court responded:

> I understand what you are saying -- *you are saying in effect that the jury would have to speculate.* [Emphasis added.]

The district court further indicated:

> But *there is no evidence . . . that sustains any suggestion of a shipment of cigarettes or shipments of cigarettes which accompanies the telephone calls to the bank.* [Transcript, pp. 647 and 648.] [Emphasis added.]

Finally, under the principle of double jeopardy (whether the *same* proof would be sufficient to uphold conviction on more than one count), the Government cannot offer identical evidence on each of the separate counts. *United States v. Heffington*, 682 F.2d 1075, 1081 (5th Cir. 1982), and *United States v. Hairrell*, 521 F.2d 1264, 1266 (6th Cir. 1975). The absence of differing evidence on each count precludes multiple convictions. *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 Ed.2d 187

(1977). The Indictment herein is further objected to on the ground of "multiplicity," the charging of a single offense in separate counts which is prohibited. *Id. See also,* Wright, Federal Practice and Procedure, § 142, p. 306 (1969 Ed.).

Suggestion that Case be Reheard In Banc

Pursuant to Federal Rules of Appellant Procedure, Rule 35, petitioner further suggests to the Judges of this honorable Court that the above-entitled cause is appropriate for consideration on hearing by all the Judges of this Court convened *in banc*, and in support of this suggestion petitioner suggests:

1. That the issues involved as set forth above, involve questions of great public interest and present frequently recurring questions or issues which are likely to affect many cases before this Court.

Statement of Counsel

I, Edgar Paul Boyko, express a belief, based on a reasoned and studied professional judgment, that the November 2, 1983 panel decision overlooked or misapprehended certain of the legal and factual issues set forth above, and the consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court, to wit, *United States v. Henderson*, 386 F.2d 1048 (S.D. N.Y. 1974) and *United States v. Maze*, 414 U.S. 395, 94 S.Ct. 645 (1974), and this appeal involves a question of exceptional importance, to wit, whether the Government should be permitted to apply the wire fraud statute in cases where Congress has enacted particularized legislation dealing directly with schemes to defraud state governments of tax revenues resulting from contraband cigarettes, especially where the penalty will be increaed thereby.

WHEREFORE, petitioner respectfully requests:

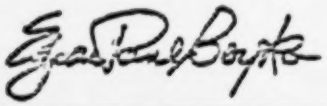
1. That a rehearing of the appeal in the above-entitled cause be granted; and

2. That the Honorable Judges of this Court order that the above-entitled cause be heard by the Court *in banc*.

DATED: December 6, 1983

Respectfully submitted,

MILLER, BOYKO AND BELL

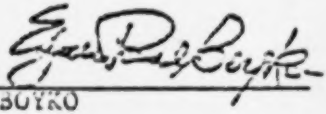


By_____
EDGAR PAUL BOYKO,
Appearing Pro Hac Vice as
Attorneys for Appellant,
Paul DeFiore

ALBERT J. BRACKLEY
Of Co-Counsel for Appellant,
Paul DeFiore

Certificate

As counsel for Appellant, Paul DeFiore, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.



EDGAR PAUL BOYKO

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTES

15 U.S.C. § 375 (the Jenkins Act), provides:

> For the purposes of this Act [15 USCS §§ 375 *et seq.*]-
>
> (1) The term "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.
>
> (2) The term "cigarette" means any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated, or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material except tobacco.
>
> (3) The term "distributor licensed by or located in such State" means -

(A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, or any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

(4) The term "use," in addition to its ordinary meaning, means the consumption, storage, handling, or disposal of cigarettes.

(5) The term "tobacco tax administrator" means the State official duly authorized to administer the cigarette tax law of a State.

(6) The term "State" includes the District of Columbia, Alaska, Hawaii, and the Commonwealth of Puerto Rico.

(7) The term "transfers for profit" means any transfer for profit or other disposition for profit, including any transfer or disposition by an agent to his principal in connection with which the agent receives anything of value.

15 U.S.C. § 376, provides:

(a) Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall-

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name

and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, the quantity thereof.

(b) The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a)(1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

15 U.S.C. § 377, provides:

Whoever violates any provision of this Act [15 USCS §§ 375 *et seq.*] shall be guilty of misdemeanor and shall be fined not more than $1,000, or imprisoned not more than 6 months, or both.

18 U.S.C. § 1341 (the Mail Fraud Statute), provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligations, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do,

places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined no more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (the Wire Fraud Statute), provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined no more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2341 (Trafficking in Contraband Cigarettes Act), provides:

> As used in this chapter [18 USCS §§ 2341 *et seq.*]-
>
> (1) the term "cigarette" means-
>
> (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; and
>
> (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A);

(2) the term "contraband cigarettes" means a quantity in excess of 60,000 cigarettes, which bear no evidence of the payment of applicable State cigarette taxes in the State where such cigarettes are found, if such State requires a stamp, impression, or other indication to be placed on packages or other containers of cigarettes to evidence payment of cigarette taxes, and which are in the possession of any person other than-

(A) a person holding a permit issued pursuant to chapter 52 of the Internal Revenue Code of 1954 [26 USCS §§ 5701 *et seq.*] as a manufacturer of tobacco products or as an export warehouse proprietor, or a person operating a customs bonded warehouse pursuant to section 311 or 555 of the Tariff Act of 1930 (19 U.S.C. 1311 or 1555 [19 USCS § 1311 or 1555]) or an agent of such person;

(B) a common or contract carrier transporting the cigarettes involved under a proper bill of lading or freight bill which states the quantity, source, and destination of such cigarettes;

(C) a person-

(i) who is licensed or otherwise authorized by the State where the cigarettes are found tc account for and pay cigarette taxes imposed by such State; and

(ii) who has complied with the accounting and payment requirements relating to such license or authorization with respect to the cigarettes involved; or

(D) an officer, employee, or other agent of the United States or a State, or any department, agency, or instrumentality of the United States or a State (including any political subdivision of a State) having possession of such cigarettes in connection with the performance of official duties;

(3) the term "common or contract carrier" means a carrier holding a certificate of convenience and necessity, a permit for contract carrier by motor vehicle, or other valid operating authority under the Interstate Commerce Act [49 USCS §§ 10101 *et seq.*], or under equivalent operating authority from a regulatory agency of the United States or of any State;

(4) the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Virgin Islands; and

(4) the term "Secretary" means the Secretary of the Treasury.

18 U.S.C. § 2342, provides:

(a) It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes.

(b) It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter [18 USCS §§ 2341 *et seq.*] to be kept in the records of any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction.

18 U.S.C. § 2343, provides:

(a) Any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction

shall maintain such information about the shipment, receipt, sale, and distribution of cigarettes as the Secretary may prescribe by rule or regulation. The Secretary may require such person to keep only-

> (1) the name, address, destination (including street address), vehicle license number, driver's license number, signature of the person receiving such cigarettes, and the name of the purchaser;
>
> (2) a declaration of the specific purpose of the receipt (personal use, resale, or delivery to another);
>
> (3) a declaration of the name and address of the recipient's principal in all cases when the recipient is acting as an agent.

Such information shall be contained on business records kept in the normal course of busines Nothing contained herein shall authorize the Secretary to require reporting under this section.

(b) Upon the consent of any person who ships, sells, or distributes any quantity of cigarettes in excess of 60,000 in a single transaction, or pursuant to a duly issued search warrant, the Secretary may enter the premises (including places of storage) of such person for the purpose of inspecting any records or information required to be maintained by such person under this chapter [18 USCS §§ 2341 *et seq.*], and any cigarettes kept or stored by such person at such premises.

18 U.S.C. § 2344, provides:

> (a) Whoever knowingly violates section 2342(a) of this title [18 USCS § 2342(a)] shall be fined not more than $100,000 or imprisoned not more than five years, or both.
>
> (b) Whoever knowingly violates any rule or regulation promulgated under section 2343(a) or 2346 of this title [18 USCS § 2342(a) or 2346] or violates section 2352(b) of this title [18 USCS § 2342(b)] shall be fined not more than $5,000 or imprisoned not more than three years, or both.

(c) Any contraband cigarettes involved in any violation of the provisions of this chapter [18 USCS §§ 2341 *et seq.*] shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 [26 USCS §§ 1 *et seq.*] relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of such Code [26 USCS § 5845(a)], shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter [18 USCS §§ 2341 *et seq.*]

18 U.S.C. § 2344, provides:

(a) Nothing in this chapter [18 USCS §§ 2341 *et seq.*] shall be construed to affect the concurrent jurisdiction of a State to enact and enforce cigarette tax laws, to provide for the confiscation of cigarettes and other property seized for violation of such laws, and to provide for penalties for the violation of such laws.

(b) Nothing in this chapter [18 USCS §§ 2341 *et seq.*] shall be construed to inhibit or otherwise affect any coordinated law enforcement effort by a number of States, through interstate compact or otherwise, or provide for the administration of State cigarette tax laws, to provide for the confiscation of cigarettes and other property seized in violation of such laws, and to establish cooperative programs for the administration of such laws.

New York Statutes, Article XX, § 171 provides that in relation to its taxing powers that:

The state tax commission shall:

First. Make such reasonable rules and regulations, not inconsistent with law, as may be necessary for the exercise of its powers and the performance of its duties under this chapter.

Second. Assess, determine, revise, readjust and impose the corporation taxes under articles nine and nine-a of this chapter, and on and after July first, nineteen hundred and twenty-one, have the power and perform the duties of the state comptroller in the collection of such taxes and the crediting of such taxes erroneously paid, as

jurisdiction thereof is vested in such commission by section one hundred and seventy-six of this chapter.

Third. On and after July first, nineteen hundred and twenty-one, have the powers and perform the duties of the state comptroller in relation to the assessment, determination and collection of the tax on transfers of property, as jurisdiction thereof is vested in such commission by section one hundred and seventy-six of this chapter.

Fourth. On and after July first, nineteen hundred and twenty-one, have the powers and perform the duties of the state comptroller in the collection of the tax on transfers of stock under article twelve of this chapter, as jurisdiction thereof is vested in such commission by section one hundred and seventy-six of this chapter.

Fifth. On and after July first, nineteen hundred and twenty-one, have the power and perform the duties of the state comptroller in the assessment, determination, review, readjustment and collection of taxes upon and with respect to personal income, as jurisdiction thereof is vested in such commission by section one hundred and seventy-six of this chapter.

Sixth. Administer, supervise and enforce the tax on mortgages as provided in article eleven of this chapter.

Seventh. On and after July first, ninetenn hundred and twenty-one, have the powers and perform the duties of the secretary of state under articles eleven and eleven-a of the highway law, in relation to motor vehicles and motor cycles, as jurisdiction thereof is vested in commission by section one hundred and seventy-eight of this chapter.

Eighth. Take testimony and proofs, under oath, with reference to any matter with the line of its official duty. Any member of such commission, a deputy tax commissioner and such other officials and employees of the department of taxation and finance as may be nominated by such commission by resolution recorded in its minutes may be designated for the purpose of taking such testimony and proofs and any such member of the commission, deputy tax commissioner or other official or employee so nominated may be designated by such

commission for the purpose of holding any hearing authorized or required under the provisions of this chapter.

Ninth. Require from all state and local officers such information as may be necessary for the proper discharge of its duties.

Tenth. Hold meetings at an office to be assigned it in one of the state buildings at Albany, at such times as may be fixed by the president or a majority of the commission or by adjournment thereof, or at such other places as it may designate.

Eleventh. Compile and publish statistics relating to state and local taxation.

Twelfth. Make investigations of the general system of state taxation from time to time.

Thirteenth. Inquire into the provisions of the law of other states and jurisdictions; to confer with tax commissioners of other states regarding the most effectual and equitable methods of taxation, and particularly regarding the best methods of avoiding conflicts and duplication of taxation, and to recommend to the legislature such measures as will bring about uniformity of methods, harmony and co-operation between the different states and jurisdictions in matters of taxation.

New York Statutes, Article XX, Section 471, provides, in relation to the imposition of taxes, that:

1. There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale on and after February first, nineteen hundred seventy-two except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax or sold to the United States or sold to or by a voluntary unincorporated organization of the armed forces of the United States operating a place for the sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States. Such tax on cigarettes shall be at the rate of seven and one-half cents for each ten cigarettes or fraction thereof

and is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof.

2. It is intended that the ultimate incidence of and liability for the tax shall be upon the consumer, and that any agent or dealer who shall pay the tax to the tax commission shall collect the tax from the purchaser or consumer. Except as hereinafter provided, the tax shall be advanced and paid by the agent. The agent shall be liable for the collection and payment of the tax on cigarettes imposed by this article and shall pay the tax to the tax commission by purchasing, under such regulations as it shall prescribe, adhesive stamps of such designs and denominations as it shall prescribe. The tax on cigarettes may also be paid by or through the use of metering machines if the tax commission so prescribes. Agents, located within or without the state, shall purchase stamps and affix such stamps in the manner prescribed to packages of cigarettes to be sold within the state, in which case any dealer subsequently receiving such stamped packages of cigarettes will not be required to purchase and affix stamps on such packages of cigarettes. Notwithstanding any other provision of this article, the tax commission may by regulation provide that the tax on cigarettes imposed by this article shall be collected without the use of stamps.

3. The amount of taxes advanced and paid by the agent as hereinabove provided shall be added to and collected as part of the sales price of the cigarettes.

New York Statutes, Article XX, Section 481, provides that the penalty for violation of Section 471, *supra*, is as follows:

1. (a) An agent who or which fails to file a return or to pay any tax within the time required by or pursuant to this article shall thereby forfeit to the state a penalty of five per centum of the amount of tax determined to be due as provided in this article plus one per centum of such amount for each month of delay or fraction thereof after

the expiration of the first month after such return was required to be filed or such tax become due; but the tax commission, if satisfied that the delay was excusable, may remit all or any part of such penalty. If a tax on cigarettes under this article is not paid when due by any other person, the person liable for the payment of such tax shall forfeit to the state a penalty of fifty per centum of the amount of such tax determined to be due as provided in this article plus one per centum of such amount for each month of delay or fraction thereof after the expiration of the first month after such tax became due; but the tax commission, if satisfied that the delay was excusable may remit all or any part of such penalty. Such penalties shall be determined, assessed, collected and paid in the same manner as the taxes imposed by this article and shall be disposed of as hereinafter provided with respect to moneys derived from the tax.

(b) In addition to any other penalty imposed by this article, the tax commission may impose a penalty of not more than one hundred dollars for each two hundred cigarettes or fraction thereof in excess of two thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. Such penalty shall be determined as provided in section four hundred seventy-eight of this chapter, and may be reviewed only pursuant to such section. Such penalty shall be collected in the same manner as the taxes imposed by this article. The tax commission, in its discretion, may remit all or part of such penalty. Such penalty shall be paid to the department of taxation and finance and disposed of as hereinafter provided with respect to moneys derived from the tax.

2. Any person other than an agent, who possess or transports for the purpose of sale any unstamped or unlawfully stamped packages of cigarettes subject to the tax imposed by section four hundred seventy-one of this chapter, or who sells or offers for sale unstamped or unlawfully stamped packages of cigarettes in violation of the provisions of this article, or who willfully attempts in any manner to evade or defeat the taxes imposed by this article, or the payment thereof, shall be guilty of a

misdemeanor and upon conviction thereof, for a first offense, shall be sentenced to pay a fine of not more than two thousand dollars, or to be imprisoned for not more than one year, or both, in the discretion of the court; and for a second offense, shall be sentenced to pay a fine of not less than five hundred dollars nor more than five thousand dollars, and to be imprisoned for a definite fixed period which shall be not less than six months and not more than one year. Any person who has previously been convicted two or more times under this section, or who, regardless of any previous convictions, possesses or transports for the purpose of sale twenty thousand or more cigarettes subject to the tax imposed by section four hundred seventy-one of this chapter in any unstamped or unlawfully stamped packages, or who, regardless of any previous convictions, sells or offers for sale twenty thousand or more cigarettes in any unstamped or unlawfully stamped packages in violation of the provisions of this article, or who, regardless of any previous convictions, willfully attempts in any manner to evade or defeat the taxes imposed by this article or the payment thereof on twenty thousand or more cigarettes, shall be guilty of a class E felony.

The possession or transportation within this state by any person other than an agent at any one time of five thousand or more cigarettes in unstamped or unlawfully stamped packages shall be presumptive evidence that such cigarettes are possessed or transported for the purpose of sale and are subject to the tax imposed by section four hundred seventy-one of this chapter. Such possession or transportation shall render inoperative any provisions of this title providing for a time period during which a use tax may be paid on unstamped cigarettes or unlawfully or improperly stamped cigarettes or during which such cigarettes may be returned to an agent. The possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages by any person other than an agent at any one time shall be presumptive evidence that such cigarettes are subject to tax as provided by this article.

Nothing in this subdivision shall apply to common or contract carriers or warehousemen while engaged in lawfully transporting or storing unstamped packages of cigarettes as merchandise, nor to any employee of such carrier or warehouseman acting within the scope of his employment, nor to public officers or employees in the performance of their official duties requiring possession or control of unstamped or unlawfully stamped packages of cigarettes, nor to temporary incidental possession by employees or agents of persons lawfully entitled to possession, nor to persons whose possession is for the purpose of aiding police officers in performing their duties.

3. Any agent or dealer who shall fail, neglect or refuse to comply with, or shall violate the provisions of this article or the rules and regulations promulgated by the tax commission under this article, shall be guilty of a misdemeanor and upon conviction, for a first offense, shall be sentenced to pay a fine of not more than five hundred dollars, or to be imprisoned for not more than sixty days, or both such fine and imprisonment in the discretion of the court; and for a second or subsequent offense, shall be sentenced to pay a fine of not less than five hundred dollars or more than one thousand dollars, or to be imprisoned for not more than six months, or both such fine and imprisonment in the discretion of the court.

4. Any person who falsely or fraudulently makes, forges, alters or counterfeits any stamp prescribed by the tax commission under the provisions of this article, or causes to procures to be falsely or fraudulently made, forged, altered or counterfeited any such stamp, or knowingly and willfully utters, purchases, passes or tenders as true any such false, forged, altered, or counterfeited stamp, or knowingly and willfully possesses any cigarettes in packages bearing any such false, forged, altered or counterfeited stamps, and any person who knowingly and willfully makes, causes to be made, purchases or receives any device for forging or counterfeiting any stamp prescribed by the tax commission under the provisions of this article, or who knowingly and willfully possesses any such device, shall be guilty of a felony. For

the purposes of this section, the words "stamp prescribed by the tax commission" shall include a stamp, impression or imprint made by a metering machine, the design of which has been approved by such commission.